

SERVICE DATE – JANUARY 26, 2005

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33388 (Sub-No. 95)¹

CSX CORPORATION AND CSX TRANSPORTATION, INC.,
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
— CONTROL AND OPERATING LEASES/AGREEMENTS —
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

[PETITION TO APPROVE SETTLEMENT AGREEMENT AND
EXEMPT EMBRACED TRANSACTIONS]

Decided: January 19, 2005

By petition filed August 6, 2004, in the lead docket, Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, NS) and Wheeling & Lake Erie Railway Company (W&LE) have asked us: (1) to approve a Settlement Agreement that they entered into to implement and satisfy certain conditions the Board imposed in connection with the Conrail Transaction; and (2) to find that the Settlement Agreement is consistent with and reasonably implements those conditions. NS and W&LE also simultaneously filed five notices and a petition in the six embraced dockets listed in footnote 1, for exemption authority under 49 U.S.C. 10502 for the six transactions provided for in the Settlement Agreement that require Board authorization. By decision served November 4, 2004, a proceeding was instituted to consider these matters. In this decision we find that the Settlement Agreement, when implemented, will satisfy the pertinent conditions imposed by the Board, and we grant the authority sought by NS and W&LE.

¹ This decision embraces: STB Finance Docket No. 33388 (Sub-No. 96), Wheeling & Lake Erie Railway Co. — Trackage Rights Exemption — Norfolk Southern Railway Co. Between Bellevue and Toledo, OH; STB Finance Docket No. 33388 (Sub-No. 97), Wheeling & Lake Erie Railway Co. — Trackage Rights Exemption — Norfolk Southern Railway Co. in Cleveland, OH; STB Finance Docket No. 33388 (Sub-No. 98), Norfolk Southern Railway Co. — Trackage Rights Exemption — Wheeling & Lake Erie Railway Co. Between Clairton, PA and Bellevue, OH; STB Finance Docket No. 33388 (Sub-No. 99), Wheeling & Lake Erie Railway Co. — Petition for Exemption — Purchase of the Toledo Pivot Bridge — Norfolk Southern Railway Co.; STB Finance Docket No. 32516 (Sub-No. 1), Wheeling & Lake Erie Railway Co. — Lease and Operation Exemption — Norfolk and Western Railway Co.'s Dock at Huron, OH; and STB Finance Docket No. 32525 (Sub-No. 1), Wheeling & Lake Erie Railway Co. — Trackage Rights Exemption — Norfolk and Western Railway.

BACKGROUND

In CSX Corp. et al. — Control — Conrail Inc. et al., 3 S.T.B. 196 (1998) (Decision No. 89),² we approved, subject to various conditions, the joint acquisition by CSX Corporation and CSX Transportation, Inc. (collectively, CSX) and NS of control of Conrail Inc. and Consolidated Rail Corporation (collectively, Conrail) and the subsequent division of the Conrail assets between CSX and NS. That transaction is referred to in this decision as the Conrail Transaction. Pursuant to Decision No. 89, CSX and NS acquired control of Conrail on August 22, 1998 (the Control Date), and divided Conrail's assets between them on June 1, 1999 (the Split Date).

W&LE, a regional railroad that had been created in 1990 as an NS spin-off and that had thereafter expanded with line acquisitions and trackage rights grants from CSX, NS, and Conrail, was concerned that it would be severely affected by the Conrail Transaction as proposed. W&LE therefore sought extensive relief. See Decision No. 89, 3 S.T.B. at 428-30 (summary of W&LE's submissions). In approving the Conrail Transaction, the Board granted in part and denied in part the relief sought by W&LE. See 3 S.T.B. at 309-11, 392 (paragraph 68). As pertinent here, NS was ordered: (a) to grant W&LE overhead haulage or trackage rights access to Toledo, OH, with connections to Ann Arbor Acquisition Corporation d/b/a Ann Arbor Railroad at Toledo; and (b) to extend W&LE's lease at, and trackage rights access to, NS's Huron Dock on Lake Erie.

After the Split Date, NS provided W&LE with interim access to Toledo via haulage and then via limited operational rights between Bellevue and Toledo, pending negotiation of a settlement to implement the Toledo access condition. In addition, NS and W&LE treated the Huron Dock lease and associated trackage rights as de facto extended, pending negotiation of a settlement to implement the Huron Dock condition. NS and W&LE have now reached agreement on the essential terms for implementation of these two conditions, as set forth in a "Settlement Term Sheet" (the Settlement Agreement) submitted to the Board. The Settlement Agreement provides that, if NS and W&LE cannot agree on the more detailed terms that remain to be negotiated, any disputes respecting such terms will be submitted to binding arbitration. NS and W&LE assert that, if the Board approves the Settlement Agreement, they foresee no circumstance that would require further Board involvement in this matter.

The Settlement Agreement. The Settlement Agreement includes seven elements and provides that the agreement is a package and that no element may be implemented without the remaining elements. Two elements concern the Toledo access condition (Elements #1 and #2), another two concern the Huron Dock condition (Elements #3 and #4), and the remaining three concern other matters (Elements #5, #6, and #7). By statute, Board authorization is required for Elements #2, #3, #4, #5, and #6 and for the trackage rights component of Element #1. However, Board authorization is not required for the haulage rights component of Element #1 or for Element #7.

² Aff'd sub nom. Erie-Niagara Rail Steering Committee v. STB, 247 F.3d 437 (2d Cir. 2001).

Element #1: Grant of Bellevue-Toledo Trackage Rights and Haulage Rights to W&LE. The Settlement Agreement provides that W&LE will be granted overhead trackage rights, “limited to one train per day per direction,” between Bellevue (Yeomans), OH, at Milepost (MP) T-54.7 and Toledo (Manhattan Jct.), OH, at MP CS-1.30, along the same route that W&LE has been operating over on an interim basis since the Split Date. NS and W&LE explain that, because portions of the Bellevue-Toledo route are heavily used and have limited capacity, W&LE’s post-Split Date operations over this route have been subject to the one-train-per-day limitation. NS and W&LE note, however, that the Settlement Agreement provides that this limitation will be lifted upon the completion of certain specified enhancements to the capacity of the Bellevue-Toledo route and NS’s Homestead Yard in Toledo. The Settlement Agreement also provides that NS shall provide W&LE with back-up haulage rights for overflow traffic.

The Settlement Agreement provides that W&LE’s access to Toledo via trackage and haulage rights will terminate if W&LE is acquired (directly or indirectly) by another rail carrier or carrier interest. NS and W&LE assert that this termination provision properly reflects the possibility that the basis for the Toledo access condition, see 3 S.T.B. at 309-11, could be affected by such a change.

In STB Finance Docket No. 33388 (Sub-No. 96), W&LE has invoked the class exemption at 49 CFR 1180.2(d)(7) for the Bellevue-Toledo trackage rights.

Element #2: Purchase of Toledo Pivot Bridge by W&LE. The Settlement Agreement provides that W&LE will purchase the Toledo Pivot Bridge that W&LE has been using to access Toledo and that NS will use the bridge only upon a mutually agreeable understanding. The Toledo Pivot Bridge, also known as the Maumee River Bridge, is a railroad swing bridge spanning the Maumee River in Toledo, and is located on the NS Bellevue-Toledo line. In Decision No. 89, the Board authorized NS to discontinue operations over the bridge, see 3 S.T.B. at 244 (regarding the notice of exemption filed in STB Docket No. AB-290 (Sub-No. 197X)); see also 3 S.T.B. at 392 (paragraph 71), and NS has discontinued such operations. NS and W&LE assert that W&LE, the sole remaining user of the bridge, should have the operational flexibility that will result from owning and controlling the bridge, which until now has been staffed and maintained by NS.

In STB Finance Docket No. 33388 (Sub-No. 99), W&LE has filed a petition pursuant to § 10502 for an exemption from the requirements of § 10902 for the Toledo Pivot Bridge purchase.

Element #3: 10-Year Extension of W&LE’s Lease of NS’s Huron Dock. The Settlement Agreement provides that the existing W&LE lease of NS’s Huron Dock will be extended for 10 years from the date of our approval of the Settlement Agreement, with two modifications. First, the lease rental shall be \$15,000 per month, until such time as the Bellevue-Toledo capacity expansion is completed and W&LE’s trackage rights become unlimited, at which time the rental shall be reduced to \$10,000 per month. Second, if NS needs dock capacity and if such capacity becomes available at Huron, NS may utilize a portion of the dock capacity to be agreed upon, with a commensurate reduction in rental paid by W&LE.

In STB Finance Docket No. 32516 (Sub-No. 1), W&LE has invoked the class exemption at 49 CFR 1180.2(d)(4) for the Huron Dock lease extension.

Element #4: 10-Year Extension of W&LE's Bellevue-Huron Dock Trackage Rights. The Settlement Agreement provides that W&LE's existing Bellevue-Huron Dock overhead trackage rights, by which W&LE accesses Huron Dock, will be extended to a term coextensive with the extended Huron Dock lease term (i.e., 10 years from the date of our approval). The Bellevue-Huron Dock trackage rights, which are subject to a "one train per day in each direction" limitation, run over the NS line between approximately MP B242 at Bellevue, OH, and approximately MP B229 at Berlin Heights, OH, and between approximately MP B232 at Shinrock, OH (on the Bellevue-Berlin Heights segment), and approximately MP HU12.2 at the Huron Dock connection in Huron, OH.

In STB Finance Docket No. 32525 (Sub-No. 1), W&LE has invoked the class exemption at 49 CFR 1180.2(d)(4) for the Bellevue-Huron Dock trackage rights extension.

Element #5: Grant of Berea-Knob Trackage Rights to W&LE. The Settlement Agreement provides that W&LE will be granted overhead trackage rights in the Cleveland, OH area between Berea, OH (at MP CD-194.2), and Knob, OH (at MP GZ-488.13). These trackage rights are intended to be used in combination with rights for W&LE to operate over NS's lines between the Knob and Campbell Road Yard, and over CSX's lines between Wellington and Berea. The Berea-Knob trackage rights will allow W&LE to handle traffic only between the Berea-Knob endpoints, and only if such traffic has a prior or subsequent move to or from Wellington via the Wellington-Berea Route.

In STB Finance Docket No. 33388 (Sub-No. 97), W&LE has invoked the class exemption at 49 CFR 1180.2(d)(7) for the Berea-Knob trackage rights.

Element #6: Grant of Clairton-Bellevue Trackage Rights to NS. The Settlement Agreement provides that NS will be granted overhead trackage rights between Clairton, PA (at MP 5.2), and Bellevue, OH (at MP H53.7), with rights of ingress and egress at Mingo Jct., OH, Jewett, OH, Bowerston, OH, and Orrville, OH, to the extent permitted by existing connections or such future connections as may be built and maintained by NS. The Settlement Agreement provides that W&LE will use its best efforts to permit NS to obtain trackage rights over the Jewett-Bowerston segment, which is owned by the State of Ohio and operated by The Columbus & Ohio River Rail Road Company (C&OR), and over which W&LE operates pursuant to trackage rights granted to W&LE by C&OR.

In STB Finance Docket No. 33388 (Sub-No. 98), NS has invoked the class exemption at 49 CFR 1180.2(d)(7) for the Clairton-Bellevue trackage rights.

Element #7: Creation of New Road At-Grade Crossing for Use by NS In Maple Heights and Broader Agreement Regarding Operations In Maple Heights. The Settlement Agreement

provides that, to allow NS to access a new trailer parking facility in the Maple Heights area (located a few miles southeast of Cleveland), NS will be allowed to create and use a second road at-grade crossing over W&LE's Cleveland Subdivision line (at MP 8.67) under the same terms and conditions that govern NS's use of the existing road at-grade crossing over the W&LE line (at MP 9.03). The Settlement Agreement further provides for NS and W&LE to negotiate a broader agreement regarding operations in the Maple Heights area. NS and W&LE are currently evaluating two options, both of which involve the lease, by NS, of freight rights on the Randall Secondary.

As indicated above, implementation of the Maple Heights element does not require Board authorization.

Effective Date. Authorization for the transactions under the class exemptions at 49 CFR 1180.2(d) would ordinarily have become effective on August 13, 2004 (7 days after the notices were filed). However, by its terms the Settlement Agreement is contingent upon our approval of the agreement and all of the exemption authority that has been sought. Accordingly, NS and W&LE state that they do not intend to consummate the transactions contemplated by the Settlement Agreement until they receive our approval of the Settlement Agreement and execute the relevant definitive documents for Elements #1, #2, #3, #4, #5, and #6.

DISCUSSION AND CONCLUSIONS

Relevant Statutory Provisions. The petitions and notices filed in these cases implicate 49 U.S.C. 11327, 11323, 10902, and 10502. Under section 11327, "[w]hen cause exists, the Board may make appropriate orders supplemental to an order made in a proceeding under sections 11322 through 11326 of this title," such as Decision No. 89. Under sections 11323 and 10902 (depending upon the size of the rail carriers involved) Board approval is required to enter into such arrangements as a lease or trackage rights. However, under section 10502, the Board is directed to exempt a transaction from other provisions of the statute when it finds that the application of those provisions (1) is not necessary to carry out the transportation policy of 49 U.S.C. 10101 and (2) either (A) the transaction or service is of limited scope; or (B) the application of the provision is not needed to protect shippers from abuse of market power.

The Settlement Agreement. The Settlement Agreement was entered into by NS and W&LE to implement the Toledo access and Huron Dock conditions imposed in connection with the Conrail Transaction (Elements #1, #2, #3, and #4); to resolve a longstanding dispute respecting W&LE's rights to operate on NS's Berea-Knob tracks (Element #5); and for NS to secure certain rights it seeks (Elements #6 and #7).

We find that the proposals to implement the Toledo access and Huron Dock conditions (Elements #1, #2, #3, and #4) are consistent with and reasonably implement those conditions. Those conditions were imposed for W&LE's benefit, and W&LE has determined that these elements satisfy its concerns.

The Settlement Agreement has been structured and presented to us as a package, and we see nothing in the agreement that causes us concern. Detailed scrutiny of each component of the Settlement Agreement is not necessary. There is no indication that any of the transactions contemplated by the Settlement Agreement will have an adverse impact on any shipper. Rather, we expect that these transactions will allow both W&LE (as respects Elements #1, #2, #3, #4, and #5) and NS (as respects Elements #6 and #7) to enhance the services they can provide to their customers. Accordingly, we find that the Settlement Agreement, when implemented, will satisfy the Toledo access and Huron Dock conditions imposed by the Board in Decision No. 89.

Element #2 (The Petition for Exemption). We will grant the petition for exemption respecting the purchase of the Toledo Pivot Bridge by W&LE. Detailed scrutiny of the bridge purchase is not necessary to carry out the rail transportation policy. Granting the requested exemption will facilitate the transfer of ownership to and operation of the bridge by its sole current user, thus ensuring the development and continuation of a sound rail transportation system to meet the needs of the public, see section 10101(4), fostering sound economic conditions in transportation, see section 10101(5), and encouraging the efficient management of the property, see section 10101(9). Furthermore, the transaction is of limited scope (as it concerns the ownership of a bridge that is used by only one railroad) and Board regulation of this transaction is not needed to protect shippers from an abuse of market power.

Elements #1, #3, #4, #5, and #6 (The Notices of Exemption). We will accept the notices of exemption filed with respect to the extension of W&LE's Huron Dock lease, the extension of W&LE's Bellevue-Huron Dock trackage rights, the Berea-Knob trackage rights for W&LE, and the Clairton-Bellevue trackage rights for NS. There is reason to question whether the Bellevue-Toledo trackage rights for W&LE qualify for the class exemption at 49 CFR 1180.2(d)(7), as that class exemption does not apply to trackage rights "sought in responsive applications in rail consolidation proceedings," and the Element #1 trackage rights were originally sought in such an application, see Decision No. 89, 3 S.T.B. at 429. However, we will treat the filing as a petition for an exemption and grant it, as the Bellevue-Toledo trackage rights contemplated by Element #1 clearly meet the section 10502 exemption criteria.

Labor Protection. Under section 10502(g), we may not use our exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of adversely affected employees. Therefore, as a condition of the exemptions respecting Elements #1, #4, #5, and #6, any employee affected by the trackage rights will be protected by the labor protective conditions set forth in Norfolk and Western Ry. Co. — Trackage Rights — BN, 354 I.C.C. 605, 610-15 (1978), as modified in Mendocino Coast Ry., Inc. — Lease and Operate, 360 I.C.C. 653, 664 (1980);³ as a condition of the

³ The labor protection imposed with respect to the Bellevue-Toledo trackage rights contemplated by Element #1 does not apply to the Bellevue-Toledo haulage rights contemplated by
(continued...)

exemption respecting Element #3, any employee affected by the Huron Dock lease extension will be protected by the labor protective conditions set forth in Mendocino Coast Ry., Inc. — Lease and Operate, 354 I.C.C. 732 (1978), as modified in Mendocino Coast Ry., Inc. — Lease and Operate, 360 I.C.C. 653 (1980); and, as a condition of the exemption respecting Element #2, any employee affected by the bridge purchase will be protected pursuant to section 10902(d), subject to the standards and procedures established in Wisconsin Central Ltd. — Acquisition Exem. — Union Pac. RR, 2 S.T.B. 218 (1997), aff'd in relevant part sub nom. Association of American Railroads v. STB, 162 F.3d 101 (D.C. Cir. 1998).

We find that the Settlement Agreement, when implemented, will satisfy the Toledo access and Huron Dock conditions imposed by the Board in Decision No. 89.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. In STB Finance Docket No. 33388 (Sub-Nos. 97 and 98), STB Finance Docket No. 32516 (Sub-No. 1), and STB Finance Docket No. 32525 (Sub-No. 1), the notices filed August 6, 2004, are accepted. Any employee affected by the trackage rights exempted in STB Finance Docket No. 33388 (Sub-Nos. 97 and 98) and STB Finance Docket No. 32525 (Sub-No. 1) will be protected by the labor protective conditions set forth in Norfolk and Western Ry. Co. — Trackage Rights — BN, 354 I.C.C. 605, 610-15 (1978), as modified in Mendocino Coast Ry., Inc. — Lease and Operate, 360 I.C.C. 653, 664 (1980). Any employee affected by the Huron Dock lease extension exempted in STB Finance Docket No. 32516 (Sub-No. 1) will be protected by the labor protective conditions set forth in Mendocino Coast Ry., Inc. — Lease and Operate, 354 I.C.C. 732 (1978), as modified in Mendocino Coast Ry., Inc. — Lease and Operate, 360 I.C.C. 653 (1980).

2. In STB Finance Docket No. 33388 (Sub-No. 96), the exemption request is granted, subject to the labor protective conditions set forth in Norfolk and Western Ry. Co. — Trackage Rights — BN, 354 I.C.C. 605, 610-15 (1978), as modified in Mendocino Coast Ry., Inc. — Lease and Operate, 360 I.C.C. 653, 664 (1980).

3. In STB Finance Docket No. 33388 (Sub-No. 99), the exemption request is granted, subject to the labor protection specified in 49 U.S.C. 10902(d) and the standards and procedures established in Wisconsin Central Ltd. — Acquisition Exem. — Union Pac. RR, 2 S.T.B. 218 (1997),

³(...continued)
Element #1.

aff'd in relevant part sub nom. Association of American Railroads v. STB, 162 F.3d 101 (D.C. Cir. 1998).

4. Notice will be published in the Federal Register on January 26, 2005.

5. This decision, and the several exemptions provided for herein, shall be effective on February 25, 2005. Petitions for stay must be filed by February 7, 2005. Petitions for reconsideration must be filed by February 15, 2005.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary